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IN THE COURT OF APPEALS OF INDIANA

BENNIE LEE RILEY, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A03-0609-CR-440
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Salvador Vasquez, Judge
Cause No. 45G01-0509-FA-00050

May 17, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Bennie Lee Riley, Jr. appeals his forty-year sentence for criminal confinement as a Class B felony, two counts of battery as a Class C felony, and being a habitual offender. Specifically, he contends that his sentence is inappropriate in light of the nature of his offenses and his character. Although we conclude that Riley's sentence is not inappropriate, we remand this case for the limited purpose of having the trial court specify to which of the underlying felonies the habitual offender enhancement applies.

Facts and Procedural History

In September 2005, Riley was dating Dana Knight, and the two of them lived together with Riley's mother and other relatives in a Gary, Indiana, apartment. While the pair was walking back to the apartment on September 26, Riley became upset with Dana and struck her in the face. After Dana unsuccessfully tried to flag down a police officer for assistance, Riley became enraged and began hitting and kicking Dana and threatened to kill her. Then, Riley forced Dana down an alley, where he continued to hit her in the face, on the head, and in the ribs. He also knocked her to the ground and kicked her in the ribs. Holding on to the back of her shirt, Riley directed Dana back to the apartment, where Riley's mother instructed him to let go of Dana. Nevertheless, Riley forced Dana to an abandoned building near the apartment and pushed her through a window that he broke, all the while threatening to kill her. Once inside the abandoned building, Riley resumed hitting Dana in the face and kicking her in the ribs. Riley then struck Dana on the back of the head with a cast iron skillet and hit her with a glass jar and a piece of wood, all items that were left in the building. Riley also continued with the death threats.

Eventually, Riley stopped beating Dana, and they returned to the apartment, at which point an ambulance was called for Dana.

The State subsequently charged Riley with Count I: Attempted Murder, a Class A felony; Count II: Criminal Deviate Conduct as a Class A felony; Count III: Criminal Deviate Conduct as a Class B felony[1]; Count IV: Criminal Confinement as a Class B felony; Count V: Battery as a Class C felony; Count VI: Battery as a Class C felony; and Count VII: Criminal Confinement as a Class D felony. The State later added a count alleging that Riley is a habitual offender. Following a jury trial, Riley was acquitted of Counts I, II, and III and found guilty of Counts IV, V, VI, and VII. In a separate proceeding, the jury found Riley to be a habitual offender. The trial court entered judgments of conviction for Counts IV,[2] V,[3] and VI[4] but did not enter a judgment of conviction for Count VII. *See* Appellant's App. p. 121. Following a sentencing hearing, the trial court found two aggravators, Riley's criminal history and the fact that prior leniency has had no deterrent effect on his criminal behavior, and one mitigator, Riley's mental health issues as reflected in his Pre-sentence Investigation Report ("PSI"). Concluding that the aggravators outweigh the mitigator, the trial court sentenced Riley to an enhanced term of seventeen years for Count IV, Criminal Confinement as a Class B felony, an enhanced term of six years for Count V, Battery as a Class C felony, and an

[1] Dana testified at trial that Riley forced her to perform oral sex and submit to anal sex while they were at the abandoned building. However, the jury acquitted Riley of both counts of criminal deviate conduct; therefore, we do not include them as facts in this case.

[2] Ind. Code § 35-42-3-3.

[3] Ind. Code § 35-42-2-1.

[4] *Id.*

enhanced term of six years for Count VI, Battery as a Class C felony, all to be served concurrently. The trial court then enhanced Riley's concurrent sentence of seventeen years by twenty-three years for the habitual offender finding, for a total sentence of forty years. Riley now appeals his sentence.

Discussion and Decision

Riley contends that his sentence is inappropriate. Initially, we note that Riley committed the instant offenses after our legislature replaced the former "presumptive" sentencing scheme with the present "advisory" sentencing scheme. As long as a sentence imposed under this new scheme falls within the relevant statutory range, we review it according to a single standard, established by Indiana Appellate Rule 7(B): whether, giving due consideration to the trial court's decision, the sentence is inappropriate in light of the nature of the offense and the character of the offender. *Gibson v. State*, 856 N.E.2d 142, 146-47 (Ind. Ct. App. 2006); *McMahon v. State*, 856 N.E.2d 743, 752 (Ind. Ct. App. 2006). In performing this review, we will assess the trial court's recognition or nonrecognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed is inappropriate. *Gibson*, 856 N.E.2d at 147; *McMahon*, 856 N.E.2d at 748.

Riley argues that the trial court gave insufficient mitigating weight to his mental health issues and failed to consider his acceptance of responsibility and expression of remorse as a mitigator.[5] As for Riley's mental health issues, the PSI provides:

[5] Riley states in his Summary of the Argument that the trial court "gave undue weight to the aggravating factors." Appellant's Br. p. 4. However, Riley provides no analysis of this issue in the Argument section of his brief. *See id.* at 6. Therefore, he has waived this issue for appellate review. *See*

> [The defendant] stated that at the age of nine (9) he was diagnosed with Bipolar Disorder and Schizophrenia and was hospitalized at Methodist Northlake Hospital, Gary, IN for a period of six (6) weeks. He indicated that at the age of fourteen (14) he was sent to a psychiatric hospital in Miami, FL where he remained for one and one half years (1 ½). The defendant reported that he has taken prescription medications: *Thorazine*, *Lithium* and *Elavil* in the past.

PSI p. 11. At the sentencing hearing, Riley's attorney made the following argument to the trial court:

> Your Honor, just one thing I wanted to add is we direct the Court's attention to the portion of the presentence report that talks about my client's mental health history. And he's been in a situation where at an early age he was identified as having mental health issues manifesting themselves in terms of acting out and aggressive behavior. He had been at various times in his life on psychotropic meds, should have been on them at this point in time when all of this occurred, and he is in a situation where while that doesn't excuse anything that happened, I submit to the Court that it is recognized as a mitigating fact, and we're asking the Court to so recognize it.

Tr. p. 636. Riley then testified on his own behalf. He did not discuss his mental health issues at all, though he vaguely discussed his drug usage. At the conclusion of the sentencing hearing, the trial court found Riley's "mental health issues," as reflected in the PSI, to be a mitigator. *Id.* at 640; *see also* Appellant's App. p. 118.

On appeal, Riley claims that the trial court erred by making "no inquiry on the Record as to how Riley's long-term mental illness and substance abuse may have contributed to his commission of these crimes." Appellant's Br. p. 6. Riley, however, presented no evidence at the sentencing hearing that his mental health issues played a role in his commission of these offenses. Without such evidence before it, the trial court did

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Ind. Appellate Rule 46(a)(8)(A). Nevertheless, we note that Riley, who was twenty-nine years old at the time of the offenses in this case, had a criminal history consisting of three juvenile adjudications, six misdemeanor convictions, and four felony convictions.

not abuse its discretion by not assigning more mitigating weight to Riley's mental health issues.

Next, Riley argues that the trial court should have found his acceptance of responsibility and expression of remorse as a mitigator. Riley testified at the sentencing hearing as follows:

> First of all, I apologize to the victim and to my kids. I mean, because that's who was affected by this, more so my kids. To be honest, the situations concerning everything that happened in my life at that time was really over drugs. I mean, whether it's a point of selling them, using them and a situation I felt I was put into that honestly enraged me as far as me being given something that was taken away from me while I was in jail and my life was put in danger. So that's no excusing me because as I stand here today and know what I did, as a man, as a father, I'm willing to accept whatever this Court gives me with my head up because regardless of whether I go to prison for a little time or a lot of time, I'm going to use it to better myself anyway. Because like I said, I apologize to my family and the victim, and I'm going to keep my head up regardless. That's it.

Tr. p. 637-38. The trial court heard Riley's testimony, which makes only a brief apology to the victim and essentially blames his actions on drugs, but did not find that it constituted a mitigator. The Indiana Supreme Court has stated that the trial court's determination regarding remorse is similar to a determination of credibility. *Pickens v. State*, 767 N.E.2d 530, 535 (Ind. 2002). In the absence of evidence of some impermissible consideration by the trial court, we accept its determination of credibility. *Id*. We find no impermissible considerations. The trial court did not abuse its discretion in failing to consider this mitigator.

Having found no error on the part of the trial court in failing to assign more mitigating weight to Riley's mental health issues and in failing to find his acceptance of responsibility and expression of remorse as a mitigator, we must now determine whether

Riley's sentence is otherwise inappropriate in light of the nature of his offenses and his character. *McMahon*, 856 N.E.2d at 748; *see also* Ind. Appellate Rule 7(B). Regarding the nature of his offenses, we note that Riley confined and severely beat his girlfriend with not only his hands and legs but also with a skillet, a glass jar, and a piece of wood. Although there were several opportunities for Riley to cease his beatings of Dana, he continued to beat her in an alley and then again in an abandoned building. According to the trial court, this was "one of the most brutal beatings I've ever seen a woman undertake in all the years that I have been in this field." Tr. p. 642.

As for his character, the record shows that Riley, who was twenty-nine years old at the time of the instant offenses, had three juvenile adjudications, six misdemeanor convictions, and four felony convictions. One of the misdemeanor convictions was for domestic battery, which occurred only six months before the instant offenses. And one of the felony convictions was in 1999 for Assault Fourth Degree—Domestic Dispute out of Oregon. Riley later violated his parole in Oregon. It is apparent that Riley has failed to take advantage of the numerous chances of leniency that the courts have given him and continued down a dangerous path of crime. As such, we cannot say that Riley's forty-year sentence is inappropriate.

As a final matter, we note that it appears that the trial court did not use the habitual offender finding to enhance the sentence of one of Riley's underlying felony convictions but rather ordered the twenty-three year habitual offender sentence to run consecutive to the seventeen-year concurrent sentence for Counts IV, V, and VI. *See* Appellant's App. p. 118 ("Counts IV, V and VI are ordered served concurrently with each other but

consecutively with Count VIII [habitual offender]."). "A habitual offender finding does not constitute a separate crime nor does it result in a separate sentence. Rather it results in a sentence enhancement imposed upon the conviction of a subsequent felony." *Barnett v. State*, 834 N.E.2d 169, 173 (Ind. Ct. App. 2005). In addition, where there are two or more underlying felonies, the trial court must specify the underlying felony to which the habitual offender enhancement applies. *Edwards v. State*, 479 N.E.2d 541, 548 (Ind. 1985); *Anderson v. State*, 774 N.E.2d 906, 913 (Ind. Ct. App. 2002). Therefore, we remand this case so that the trial court can apply the habitual offender enhancement to one of Riley's underlying felonies.[6]

Affirmed in part and remanded in part.

BAILEY, J., and BARNES, J., concur.

[6] Because the trial court sentenced Riley to twenty-three years for the habitual offender finding, we assume that the court meant to attach the habitual offender enhancement to Count IV, the Class B felony. *See* Ind. Code § 35-50-2-8(h) ("The court shall sentence a person found to be a habitual offender to an additional fixed term that is not less than the advisory sentence for the underlying offense nor more than three (3) times the advisory sentence for the underlying offense. However, the additional sentence may not exceed thirty (30) years."). The advisory sentence for a Class B felony is ten years. Ind. Code § 35-50-2-5.